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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 THE CONFEDERATED TRIBES AND  
8 BANDS OF THE YAKAMA NATION, a  
9 sovereign federally recognized Native  
10 Nation,

11  
12 Plaintiff,

13 v.

14 KLINKITAT COUNTY, a political  
15 subdivision of the State of Washington;  
16 KLINKITAT COUNTY SHERIFF'S  
17 OFFICE, an agency of Klickitat County;  
18 BOB SONGER, in his official capacity;  
19 KLINKITAT COUNTY DEPARTMENT  
20 OF THE PROSECUTING ATTORNEY,  
an agency of Klickitat County; and  
DAVID QUESNEL, in his official  
capacity,

Defendants.

NO. 1:17-CV-3192-TOR

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECLARATORY JUDGMENT

18  
19 A bench trial was held from July 29 to 31, 2019. Plaintiff Confederated  
20 Tribes and Bands of the Yakama Nation ("Yakama Nation") was represented by

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY  
JUDGMENT ~ 1

1 Mr. Ethan A. Jones and Ms. Shona Voelckers from the Yakama Nation Office of  
2 Legal Counsel, and Mr. R. Joseph Sexton from the firm Galanda Broadman,  
3 PLLC. Defendants Klickitat County, Klickitat County Sheriff's Office, Klickitat  
4 County Sheriff Bob Songer, Klickitat County Department of the Prosecuting  
5 Attorney, and Prosecuting Attorney David Quesnel, were represented by Mr.  
6 Timothy J. Filer and Mr. Rylan L. S. Weythman from the firm Foster Pepper  
7 PLLC, Mr. David R. Quesnel and Ms. Rebecca N. Sells from the Klickitat County  
8 Department of the Prosecuting Attorney, and Ms. Pamela B. Loginsky from the  
9 Washington Association of Prosecuting Attorneys. The United States and the State  
10 of Washington participated as *amici curiae*, filing briefs with the Court at ECF  
11 Nos. 76 and 100.

## 12 **DISPUTE**

13 In 1930, seventy-five years after the Treaty signing, Moses Sampson  
14 succinctly summarized the primary problem now before the Court: "its too bad that  
15 all the old people who knew are dead." Ex. 550 at 1.

16 The Yakama Nation contends that Klickitat County Defendants violated and  
17 continue to violate the Treaty with the Yakamas of 1855 (12 Stat. 951) and the  
18 Yakama Nation's inherent sovereign rights by exercising criminal jurisdiction over  
19 Yakama members for alleged crimes occurring within the Yakama Reservation,  
20 and in particular in an area known as Tract D. The Yakama Nation seeks

1 declaratory relief affirming that (1) the Yakama Nation Treaty negotiators would  
2 have naturally understood the Yakama Reservation's boundary described in the  
3 Treaty of 1855 to include Tract D, (2) Congress has not acted to change the  
4 Yakama Reservation's boundaries set forth in the Treaty of 1855, (3) the Yakama  
5 Reservation's southwestern boundary between Mount Adams and Grayback  
6 Mountain follows the lines surveyed and reported by Ronald Scherler in 1982,  
7 which includes Tract D within the Yakama Reservation, and (4) Defendants do not  
8 have criminal jurisdiction over Indians within the Yakama Reservation.

9       The Klickitat Defendants assert that Tract D is not, and never has been, part  
10 of the Yakama Reservation. First, they contend the Yakama Nation cannot carry  
11 its burden of proving that the parties to the Treaty of 1855 intended Tract D to be  
12 included in the reservation. Second, they contend Congress expressly settled the  
13 disputed western boundary in 1904, adopting a boundary that does not include  
14 Tract D within the reservation, which boundary is still in effect. Accordingly,  
15 Defendants assert that Klickitat County maintains full jurisdiction within the  
16 Klickitat County portion of Tract D, and has jurisdiction within the exterior  
17 boundaries of the reservation consistent with this Court's Order Denying Plaintiff's  
18 Motion for Preliminary Injunction (ECF No. 58) and *State v. Zack*, 2 Wash. App.  
19 2d 667, *review denied*, 191 Wash. 2d 1011 (2018).

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## JURISDICTION AND STANDING

The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362, and under federal common law because the Yakama Nation asserts claims arising under the Treaty of 1855. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and other relief—including injunctive relief—pursuant to 28 U.S.C. § 2202.

Plaintiff alleges that Defendants’ assertion of criminal jurisdiction over crimes within the Yakama Nation involving Indians, following the United States’ acceptance of Washington’s retrocession, constitutes a violation of the Yakama Nation’s sovereignty. Thus, “[t]he injury that the Yakama Nation has sustained, and will continue to sustain without injunction, is a violation of its sovereign legally protected rights.” Defendants do not dispute that they asserted criminal jurisdiction over Yakama members within Tract D following retrocession, nor do they deny that they will continue to exercise such jurisdiction in the future. To the contrary, Defendants maintain that they should not be prevented, by Plaintiff or this Court, from enforcing state criminal laws within the county as Tract D is not within the Yakama Reservation.

The Court finds that actual infringement of the tribe’s sovereignty, as alleged by Plaintiff in this case, establishes “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not

1 conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. A tribe has a legal interest in  
2 protecting tribal self-government from a state’s allegedly unjustified assertion of  
3 criminal jurisdiction over Indians and Indian Country. Congress, too, has a  
4 substantive interest in protecting tribal self-government. *See Moe v. Confederate*  
5 *Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976).  
6 Accordingly, the Defendants’ exercise of criminal jurisdiction over Yakama  
7 members within Tract D, if within the Reservation, would constitute an affront to  
8 sovereignty sufficient to confer standing. Plaintiff has alleged facts from which the  
9 Court could reasonably infer concrete, particularized, and actual or imminent  
10 injury. *See Lujan*, 504 U.S. at 560.

11       The Court finds that Plaintiff also satisfies Article III’s remaining  
12 requirements—plaintiff’s injury-in-fact is “fairly traceable” to the “complained-of-  
13 conduct of the defendant,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,  
14 103 (1998), and a favorable ruling would likely redress plaintiff’s injury. *Lujan*,  
15 504 U.S. at 561. As noted, Defendants confirm that they exercised criminal  
16 jurisdiction over Yakama members within Tract D and do not deny their intent to  
17 continue exercising criminal jurisdiction within Tract D because they contend it is  
18 not within the Yakama Reservation. An declaratory judgment or injunction  
19 preventing Defendants from exercising criminal jurisdiction would unquestionably  
20 prevent further alleged violations of the Yakama Nation’s sovereignty.

1 Accordingly, the Court finds that Plaintiff has satisfied Article III's standing  
2 requirements.

### 3 **UNDISPUTED FACTS**

4 The parties agreed upon the following facts (ECF No. 90 at 3-4), which the  
5 Court accepts without further proof:

6 1. For the purposes of this case, the boundaries of the area of land  
7 referred to as 'Tract D' are those surveyed by E.D. Calvin in 1932, and by Ronald  
8 Scherler in 1982, within which there are approximately 121,465.69 acres. Not all  
9 of Tract D falls within Klickitat County.

10 2. The Confederated Tribes and Bands of the Yakama Nation and the  
11 United States are parties to the Treaty with the Yakamas of June 9, 1855, codified  
12 at 12 Stat. 951 ("Treaty of 1855").

13 3. The Treaty of 1855 established the Yakama Reservation.

14 4. Article II defines the Yakama Reservation's intended boundaries, in  
15 relevant part, as follows:

16 "thence southerly along the main ridge of said mountains, passing  
17 south and east of Mount Adams, to the spur whence flows the waters  
18 of the Klickitat and Pisco rivers; thence down said spur to the divide  
19 between the waters of said rivers; thence along said divide to the  
20 divide separating the waters of the Satass River from those flowing  
into the Columbia River . . ."

1           5.     The present southern boundary of the Yakama Reservation, east of  
2 Grayback Mountain, is represented by the boundary surveyed by Berry and Lodge  
3 in 1861.

4           6.     The map entitled “A Sketch Showing The Cayuse Walla Walla  
5 Yakama And Nez Perce Purchases and Reservations” dated June 12, 1855 and  
6 signed by Territorial Governor Isaac I. Stevens (“Treaty Map”) was present at the  
7 Walla Walla Treaty Council.

8           7.     The original Treaty Map was lost in the United States’ records until  
9 approximately 1930.

10          8.     The State of Washington has retroceded to the United States of  
11 America certain portions of jurisdiction within the exterior boundaries of the  
12 Yakama Reservation that the State had previously assumed under Pub. L. 83-280.  
13 This lawsuit was commenced after Klickitat County arrested and charged a minor  
14 for criminal acts arising within Tract D to which the minor subsequently pled  
15 guilty.

16          9.     The Indian Claims Commission (“ICC”) lacked jurisdiction to change  
17 reservation boundaries. The ICC could not and did not alter the boundaries of the  
18 Yakama Reservation.

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## SPECIFIC FINDINGS AND CONCLUSIONS

Having heard the evidence, including expert testimony, and reviewed the exhibits admitted into evidence, the Court “find[s] the [following] facts specially and state[s] its conclusions of law separately” according to Federal Rule of Civil Procedure 52(a)(1). These factual findings are based at a minimum upon a preponderance of the evidence and oftentimes on clear and convincing or uncontroverted evidence.

10. The Court accepts the expert opinions of Dr. Andrew Fisher. Dr. Fisher’s reasoning and justification, citation to important pieces of evidence in the record and thoughtful approach are compelling and accepted. Dr. Fisher, unlike expert witness Michael Reis, looked at the entire historical record and came to reasoned and fair opinions; he is credible.

11. For millennia, indigenous groups that later became the fourteen Tribes and Bands which were confederated as the Yakama Nation lived and traveled throughout the Pacific Northwest for hunting, fishing, gathering roots and berries, trading, and other purposes.

12. The Klickitats and Yakamas used the lands in and around Tract D which they called Táak or Tahk [Plain] (now known as Camas Prairie) as a source of essential foods, camas roots, wápp-a-too (a tuber producing plant like potatoes, probably *Sagittaria latifolia*), salmon fishing and as a communal gathering place.



1 Every year, women and children dug up and baked the roots and camas bulbs and  
2 gathered berries, while the men hunted and fished in the area. Táak's flat and  
3 grassy meadows were an ideal location where multiple tribes and bands came  
4 together annually to trade, socialize, gamble, and race horses.

5 13. The cultural and sustenance values of Táak, as well as the need to  
6 protect it from euro-American encroachment, were recognized by federal  
7 representatives prior to the Treaty of 1855. When traveling through the area in  
8 1853 for a railroad survey, ethnographer George Gibbs noted the Klickitat and  
9 Yakama Bands' annual festivities there. In 1854, federal sub-agents recommended  
10 Camas Prairie be reserved "as soon as possible" because of the necessary foods the  
11 area provided, and the likelihood that early settlers—if allowed—would destroy  
12 the valuable roots that were then plentiful within Camas Prairie.

13 14. In May and June of 1855, the Yakama Nation's representatives  
14 gathered at the Walla Walla Treaty Council to negotiate the Treaty of 1855 with  
15 Isaac I. Stevens, the Governor and Superintendent of Indian Affairs for the  
16 Territory of Washington.

17 15. The federal Indian law canons of Treaty construction provide that  
18 "Indian treaties 'must be interpreted in light of the parties' intentions, with any  
19 ambiguities resolved in favor of the Indians' and the words of a treaty must be  
20 construed 'in the sense in which they would naturally be understood by the

1 Indians[.]” *Herrera v. Wyoming*, 139 S.Ct. 1686, 1699 (2019) (citations omitted);  
2 *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (“the treaty must therefore be construed,  
3 not according to the technical meaning of its words to learned lawyers, but in the  
4 sense in which they would naturally be understood by the Indians.”).

5 16. The Supreme Court has repeatedly stressed that the language of the  
6 Treaty “should be understood as bearing the meaning that the Yakamas understood  
7 it to have in 1855.” *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S.Ct.  
8 1000, 1011 (2019).

9 17. Three important pieces of evidence chronicle what happened at the  
10 Treaty Council: the Treaty of 1855 (Ex. 6), the contemporaneously executed map  
11 (the “Treaty Map”) (Ex. 55; Ex 56 (a 1939 reproduction of original Treaty Map)),  
12 and the official minutes from the Treaty Council (“Treaty Minutes”) (Ex. 32).

13 18. The Treaty Minutes are the best evidence remaining of what occurred  
14 and what Governor Stevens told the Yakama Nation’s representatives during  
15 Treaty negotiations at the Walla Walla Treaty Council.

16 19. The Yakama Nation’s representatives present at the Walla Walla  
17 Treaty Council did not speak English, so several interpreters were present to  
18 translate for the parties.  
19  
20

1           20.   The Yakama Nation’s representatives did not understand western  
2 cartography or the meaning of latitude and longitude nor is there any evidence that  
3 these concepts were explained to them.

4           21.   The Yakama Nation’s representatives, including the signatories to the  
5 Treaty of 1855, could not read the Treaty of 1855.

6           22.   Before the Treaty of 1855 was signed, Governor Stevens told the  
7 Yakama Nation’s representatives that the Yakama Reservation’s western boundary  
8 would extend “to the Cascade mountains, thence down the main chain of the  
9 Cascade mountains south of Mount Adams, thence along the Highlands separating  
10 the Pisco and the Sattass river from the rivers flowing into the Columbia. . .” Ex  
11 32 at 65. Governor Stevens said, “. . . here is the paper for the Yakamas. . . your  
12 lands are described. We got the descriptions from yourselves (sic). Then your  
13 reservations are pointed out, those you all know.” *Id.* at 100. Governor Stevens  
14 then stated that the treaties had been read over not once, but two or three times. *Id.*  
15 at 101.

16           23.   The Treaty Map was present at the Walla Walla Treaty Council and  
17 used by Governor Stevens to communicate the reservation boundaries.

18           24.   The Treaty Map depicts the Yakama Reservation’s western boundary  
19 as passing along the main ridge of the Cascade Mountains in a southerly direction  
20

1 west of Mount Adams, and then south of Mount Adams for a distance before  
2 turning east along the Yakama Reservation's southern border. Ex. 55.

3 25. In Article I of the Treaty, the Yakama Nation ceded certain rights to  
4 more than 10 million acres of land, roughly one fourth of the State of Washington,  
5 for the rights reserved in the Treaty.

6 26. The Treaty of 1855 established the Yakama Reservation. In Article II  
7 of the Treaty, the Yakama Nation reserved from the ceded lands a tract of land  
8 included within the following boundaries, to wit:

9 Commencing on the Yakama river, at the mouth of the Attah-nam  
10 River; thence westerly along said Attah-nam River to the forks; thence  
11 along the southern tributary to the Cascade Mountains; thence  
12 southerly along the main ridge of said mountains, passing south and  
13 east of Mount Adams, to the spur whence flows the waters of the  
14 Klickitat and Pisco Rivers; thence down said spur to the divide  
between the waters of said rivers; thence along said divide to the  
divide separating the waters of the Satass River from those flowing  
into the Columbia River; thence along said divide to the main  
Yakama, 8 miles below the mouth of the Satass River; and thence up  
the Yakama River to the place of beginning.

15 All which tract shall be set apart, and, so far as necessary, surveyed  
16 and marked out, for the exclusive use and benefit of said confederated  
tribes and bands of Indians, as an Indian reservation . . .

17 Ex. 6; Treaty between the United States and the Yakama Nation of Indians, 12  
18 Stat. 951, Concluded at Camp Stevens, Walla-Walla Valley, June 9, 1855; Ratified  
19 by the Senate, March 8, 1859; Proclaimed by the President of the United States,  
20 April 18, 1859.

1           27.   The Treaty of 1855's description of the Yakama Reservation is  
2 ambiguous in its call for a southwestern boundary that follows a spur and divide  
3 separating the Klickitat River from the Pisco River (i.e. Toppenish Creek) because  
4 these features do not exist between said rivers south of Mount Adams.

5           28.   Applying the canons of treaty construction, the Yakama Nation would  
6 have naturally understood the Treaty of 1855 to include Tract D within the  
7 Yakama Reservation.

8           29.   In all the years following execution of the Treaty, boundary disputes  
9 arose in multiple areas of the Yakama Reservation. Unfortunately, the Treaty Map  
10 was quickly lost in the Government's files until it was finally recovered nearly  
11 seventy-five years later, in 1930. These disputes prompted a number of erroneous  
12 federal surveys that further complicated the historical record.

13           30.   Congress passed the Indian General Allotment Act in 1887 (also  
14 known as the Dawes Act), which empowered the President to allot land to  
15 individual Indians without their consent and allowed non-Indians to purchase un-  
16 allotted lands. In 1897, a federal commission, known as the Crow-Flathead  
17 Commission, attempted to convince the Yakama Nation to approve the sale of  
18 unallotted lands within the Reservation. Ex. 17. The Yakama Nation refused,  
19 citing outstanding Reservation boundary errors. *Id.*

1           31. In 1890, George A. Schwartz's survey failed to properly identify the  
2 Yakama Reservation's western boundary by excluding almost half of the  
3 Reservation. The Yakama Nation rejected the Schwartz survey, prompting the  
4 United States to task Geological Survey Topographer E. C. Barnard with  
5 investigating the boundary.

6           32. Barnard used the White Swan Map, an inaccurate reproduction made  
7 by Governor Stevens of the lost Treaty Map. In 1900, even with this inaccurate  
8 map, Barnard's report concluded that the Schwartz Survey incorrectly excluded  
9 some 357,878 acres in the western portion of the Yakama Reservation.

10          33. In reviewing the southwestern boundary of the Reservation, Barnard  
11 relied on a conversation with Stick Joe and Chief Spencer, both enrolled Yakama  
12 Nation members, who recounted an erroneous boundary between Mount Adams  
13 and Grayback Mountain that had been described to them by federal agents years  
14 after the Treaty was signed.

15          34. Abraham Lincoln, also an enrolled Yakama Nation member and line  
16 rider, identified this erroneous boundary to Barnard, as well.

17          35. Neither Stick Joe, Chief Spencer nor Abraham Lincoln were present  
18 at the Walla Walla Treaty Council, saw the Treaty Map, nor were told the  
19 boundaries by Tribal headmen present at the Treaty Council. Only federal agents  
20

1 told them where the boundaries were, years after the Treaty was signed, which they  
2 later repeated to others.

3 36. Despite what his name implies, Chief Spencer was not a chief of the  
4 Yakama Nation that could individually speak for the entire Tribe. Neither Stick  
5 Joe nor Abraham Lincoln represented the entire Tribe.

6 37. The straight lines that Barnard drew in his report were inconsistent  
7 with the erroneous boundaries Stick Joe, Chief Spencer, and Abraham Lincoln  
8 recounted, creating further confusion in the different Yakama Reservation  
9 boundaries advocated by the federal government at that time.

10 38. The Department of Interior then reduced Barnard's calculation and at  
11 that time, only recognized an additional 293,837 acres beyond what Schwartz had  
12 surveyed.

13 39. Only Congress can diminish an Indian reservation's boundaries, and  
14 its intent to do so must be clear. *Nebraska v. Parker*, 136 S.Ct. 1072, 1078-79  
15 (2016).

16 40. This Court assesses whether an Act of Congress diminished an Indian  
17 reservation by first reviewing the statutory text, for the most probative evidence of  
18 diminishment is the statutory language used to open the Indian lands. *See Parker*,  
19 136 S.Ct. at 1079.

1           41.   Where the statutory text does not clearly evince a congressional intent  
2 to diminish an Indian reservation, this Court next reviews the history surrounding  
3 the passage of the Act of Congress for evidence that unequivocally reveals a  
4 widely held, contemporaneous understanding that the Indian reservation would  
5 shrink as a result of the legislation. *See Parker*, 136 S.Ct. at 1080.

6           42.   This Court also reviews the subsequent demographic history of the  
7 opened lands to reinforce a finding of diminishment or non-diminishment based on  
8 the statutory text, although this consideration cannot, alone, support a finding of  
9 diminishment. *See Parker*, 136 S.Ct. at 1081.

10          43.   On December 21, 1904, Congress passed a surplus lands act for the  
11 Yakama Reservation (“1904 Act”), titled “To authorize the sale and disposition of  
12 surplus or unallotted lands of the Yakima Indian Reservation, in the State of  
13 Washington.” In the 1904 Act, Congress instructed the Secretary of the Interior to  
14 treat the 293,837 acres included by Barnard and approved by Interior as part of the  
15 Yakama Reservation “for the purposes of this Act . . .” 33 Stat. 595. Congress  
16 expressly proclaimed “it being the purpose of this Act merely to have the United  
17 States to act as trustee for said Indians in the disposition and sales of said lands and  
18 to expend or pay-over to them the proceeds derived from the sales as herein  
19 provided.” *Id.*



1           44.    “Such schemes allow ‘non-Indian settlers to own land on the  
2 reservation.’ But in doing so, they do not diminish the reservation’s boundaries.”  
3 *Parker*, 136 S.Ct. at 1080 (internal citation omitted).

4           45.    The 1904 Act did not change the Treaty boundaries of the Yakama  
5 Reservation and did not effectuate a diminishment of the Reservation. The  
6 legislative history, plain language of the text, and subsequent history do not  
7 support any finding that Congress intended to diminish the Reservation.

8           46.    Indeed, Congress continued to acknowledge the boundary dispute and  
9 in 1939 appropriated funds “[f]or completion of a survey of the disputed boundary  
10 of the Yakima Reservation, Washington . . .” 53 Stat. 685, 696.

11          47.    Testimony and evidence concerning the present-day effect of  
12 recognizing Tract D as within the Reservation boundaries is irrelevant to the  
13 determination of what the parties agreed upon in the Treaty of 1855 and does not  
14 support a finding of Congressional diminishment.

15          48.    During the Congressional hearing on the 1904 Act, Representative  
16 Wesley Jones of Washington confirmed that the Yakama Nation did not agree with  
17 the Act and explained the intent of the bill was “to help provide for the better  
18 disposition of the Indian” and “to be fully protecting the Indians in all their rights .  
19 . . .” Representative Jones then reaffirmed the intent of the bill, stating “I can not  
20

1 conceive of a bill that would be fairer or more just to the Indians . . . I believe it is  
2 one of the fairest bills for the Indians that has ever been presented in this House.”

3 49. The House of Representatives Committee on Indian Affairs stated that  
4 the Yakama Nation Reservation “is a very great hindrance to the continued and  
5 complete development of that country. With so large a body of land as that held  
6 from settlement and cultivation, settlement and growth can not help but be  
7 retarded. We believe it to be very important that this reservation should be opened  
8 at once.” Ex. 20 at 5 (1904, Committee on Indian Affairs Report No. 2346).

9 50. After Congress passed the surplus lands act for the Yakama  
10 Reservation in 1904, the Campbell, Germond, and Long Survey marked the extent  
11 of the impacted land (referred to as the Barnard / Campbell Line). This survey  
12 reflected three straight boundary lines of the Reservation that excluded land in the  
13 northwest, west, and southwest areas of the Reservation.

14 51. For the benefit of the Yakama Nation, the United States brought suit  
15 to annul railroad patents issued outside the Schwartz survey but within the Barnard  
16 / Campbell Line, which suit ultimately reached the Supreme Court. *N. Pac. Ry.*  
17 *Co. v. United States*, 227 U.S. 355 (1913). The Supreme Court affirmed the  
18 Circuit Court of Appeals and Circuit Court which cancelled the railroad patents  
19 between these surveys. *Id.* at 358, 367.

1           52.    The Supreme Court decision in *N. Pac. Ry. Co.* did not establish the  
2 reservation boundaries once and for all, but rather only decided whether the  
3 railroad patent claims between two competing boundary lines were valid.

4           53.    Following the Supreme Court’s decision in the Northern Pacific  
5 Railway Company case, the United States engaged Charles Pecore to survey the  
6 Yakama Reservation’s western boundary. Pecore’s survey, accepted by the  
7 General Land Office in 1926, recognized an additional 47,593 acres in a triangular  
8 shape on the Reservation’s southwestern boundary, but it too failed to follow  
9 natural features and the language of Article II of the Treaty.

10          54.    In 1930, the United States found the original Treaty Map, after it was  
11 lost in the Department of the Interior’s files for nearly seventy-five years.

12          55.    In 1932, with the benefit of the Treaty Map, the United States tasked  
13 Elmer D. Calvin of the General Land Office to resurvey the southwestern  
14 Reservation boundary. The Calvin Survey confirmed a natural spur divide south of  
15 Mount Adams along the main ridge of the Cascade Mountains between the  
16 watersheds of the White Salmon River and Klickitat River that best represented the  
17 Treaty’s boundary description and which encompassed Camas Prairie and all of  
18 Tract D.

19          56.    As called for in the Treaty, a spur divide between the Klickitat River  
20 watershed and the Pisco River (i.e., Toppenish Creek) watershed does not exist

1 south of Mount Adams, but this spur divide located by the Calvin Survey best  
2 fulfills the Treaty's boundary description.

3 57. In 1933, Topographic Engineer F. Marion Wilkes of the Office of  
4 Indian Affairs, Department of Interior, fully supported the Calvin Survey as  
5 correctly interpreting the calls of the Treaty when read in conjunction with viewing  
6 the Treaty Map. Ex. 59.

7 58. In 1949, the Yakama Nation filed claims with the Indian Claims  
8 Commission ("ICC") seeking compensation for Yakama Reservation land that the  
9 United States patented to non-Indians without compensation to the Yakama  
10 Nation, including lands within Tract D.

11 59. Eventually, in 1966, the ICC determined that Tract D, as surveyed by  
12 Mr. Calvin, was intended to be included within the Yakama Reservation and  
13 therefore the Yakama Nation's claim to compensation was granted.

14 60. In 1968, the ICC approved a settlement with the United States paying  
15 the Yakama Nation \$2.1 million for the 97,908.97 acres that were patented to  
16 others within the 121,465.69 acres that comprise Tract D.

17 61. Since the ICC proceedings, the federal government has uniformly  
18 taken the position that Tract D lies within the boundaries of the Yakama  
19 Reservation. The United States' amicus curiae brief continues to recognize this  
20

1 now longstanding position. ECF No. 76. Of course, the United States is the only  
2 other party to the Treaty of 1855 with the Yakama Nation.

3 62. In 1972, President Nixon returned possession of 21,008.66 acres that  
4 the United States had erroneously made part of the Gifford Pinchot National Forest  
5 situated in the northwest corner of Tract D surrounding Mount Adams. Ex. 25;  
6 Executive Order 11670. President Nixon's executive order acknowledged that this  
7 land was part of the Yakama Reservation created by the Treaty of 1855.

8 63. From 1978 to 1981, United States Bureau of Land Management  
9 Cadastral Surveyor Ronald Scherler surveyed the southwestern boundary of Tract  
10 D which he marked with iron posts and brass caps. The United States Chief  
11 Cadastral Surveyor of Washington approved Scherler's survey in 1982.

12 64. Tract D, as surveyed by Cadastral Engineer Ronald Scherler and  
13 approved by the United States in 1982, is located within the exterior boundaries of  
14 the Yakama Reservation established by the Treaty of 1855. Scherler's survey  
15 marks the correct southwestern boundary of the Yakama Nation Reservation.

16 65. The Bureau of Land Management is authorized by Congress to survey  
17 Indian reservations. 25 U.S.C. § 176. The Bureau of Land Management has the  
18 authority to correct erroneous public land surveys. 43 U.S.C. § 772. The United  
19 States' corrected survey performed by Scherler, accepted and approved by the  
20

1 United States in 1982, reflects the correct southwestern boundary of the Yakama  
2 Nation Reservation.

3 66. Mr. Reis' analysis is flawed and ignores important historical events  
4 and critical pieces of evidence to come to a skewed conclusion that Tract D is not  
5 part of the Yakama Reservation. The Court rejects Mr. Reis' analysis and  
6 conclusions.

7 67. For instance, Mr. Reis relies heavily on the statements of Stick Joe  
8 and Chief Spencer, neither of whom attended the Treaty signing, but rather were  
9 told thereafter by government agents where the southwest boundary lay. This  
10 misinformation communicated to two tribal members neither of whom were  
11 binding representatives of the Nation, skewed the analysis and oral history from  
12 the beginning, until the Treaty Map was recovered in 1930. By beginning with a  
13 faulty foundation, Mr. Reis' conclusion and later historical analysis are wrong.

14 68. Mr. Reis opined that the correct boundary is the Barnard Line, but  
15 Barnard's survey is comprised of straight lines—in complete derogation of the  
16 calls of the Treaty to follow natural and monumental boundaries. Mr. Reis'  
17 opinion on this point is rejected.

18 69. Another instance of misinterpretation is Mr. Reis' emphasis on the  
19 placement of the 46th parallel on the Treaty Map with the boundaries of the  
20 Reservation shown well north of this line. First, he has improperly ignored that

1 there is no evidence that the Indians understood latitude and longitude or that it  
2 was explained to them. Next, Grayback Mountain lies within the Reservation and  
3 that mountain sits south of the 46th parallel. Mr. Reis had no explanation for that  
4 mistake on the Treaty Map, yet he places great emphasis on the fact that Camas  
5 Prairie is south of the 46th parallel and therefore, in his opinion it could not have  
6 been intended to be within the Reservation. On the one hand Mr. Reis ignores a  
7 blatant mistake and on the other hand he relies on a defective feature of the map to  
8 exclude Tract D from the Reservation. These inconsistent positions cannot be  
9 explained, justified nor accepted by the Court.

10 70. Mr. Reis placed particular emphasis on the railroad maps prepared at  
11 Governor Stevens' direction, but not shown to the Indians. Mr. Reis claimed these  
12 maps showed that Governor Stevens knew the topography and features  
13 surrounding Tract D and he did not include Tract D within the reservation's  
14 boundaries. There is no evidence that the railroad maps were shown to the  
15 Yakama Indians at the Walla Walla Treaty council, thus, the Indians did not agree  
16 upon them. The Court finds it significant that the White Swan Map later prepared  
17 by or at the direction of Governor Stevens is severely erroneous, despite that  
18 Governor Stevens had access to the railroad maps. The perspective and scale of  
19 the Treaty Map and White Swan Map are also severely distorted. *See N. Pac. Ry.*

1 *Co. v. United States*, 227 U.S. 355 (1913) (“The Stevens map, though vouched for  
2 by him to be accurate, has many inaccuracies . . . and adds to the confusion . . .”).

3         71. Defendants argued that Governor Stevens knew where Camas Prairie  
4 was located and did not include that in the Treaty Map. The same can be said that  
5 he did not know where Camas Prairie was because it is not labeled on the Treaty  
6 Map nor the White Swan map. If Governor Stevens knew where Camas Prairie  
7 was, why did he not label it and negotiate that monumental feature with the  
8 Indians, either inside or outside the reservation? Without a discussion at the Walla  
9 Walla council—a meeting of the minds—whether Governor Stevens knew of  
10 Camas Prairie from subordinates performing the railroad surveys is immaterial to  
11 what the parties agreed in the wording of the Treaty and what was shown on the  
12 Treaty Map.

13         72. It must also be noted that at the Walla Walla Treaty Council Governor  
14 Stevens said, “. . . here is the paper for the Yakamas. . . your lands are described.  
15 We got the descriptions from yourselves (sic). Then your reservations are pointed  
16 out, those you all know.” Ex. 32 at 100. The Treaty Map depicts the Yakama  
17 Reservation’s western boundary as passing along the main ridge of the Cascade  
18 Mountains in a southerly direction west of Mount Adams, and then south of Mount  
19 Adams for a distance before turning east along the Yakama Reservation’s southern  
20



1 border. Ex. 55. Governor Stevens was not giving the Yakama Nation a  
2 reservation, the Yakama Nation was reserving these lands for themselves.

3 73. Mr. Reis' opinion that the boundary should proceed from Goat Butte  
4 to Grayback Mountain, which lie north and east of Mount Adams, is thus  
5 categorically wrong.

6 74. Mr. Reis viewed certain historical facts and statements without  
7 understanding or taking into consideration the political climate and motivation of  
8 those speakers and actors. For instance, the Dawes Act did not benefit the Indians;  
9 rather, it was designed to take property away from them in order to diminish their  
10 land and sovereignty, absorbing them into the non-Indian culture. Later, in the  
11 1930s, Congress took the view of supporting the Indian culture and the  
12 independent sovereignty of the Indians and the 1934 Indian Reorganization Act  
13 (known as the Wheeler-Howard Law) prohibited any further land allotment. By  
14 failing to recognize and appreciate the waxing and waning political climate and  
15 motivations of various actors, Mr. Reis came to an unsupportable and incorrect  
16 opinion.

### 17 **RETROCESSION OF PUB. L. 83-280 JURISDICTION**

18 The second issue presented in this case is the scope of state law jurisdiction  
19 within the Yakama Reservation. Jurisdiction over the Yakama Reservation, as  
20 with all Indian Country, rests with federal and Yakama authorities "except where

1 Congress in the exercise of its plenary and exclusive power over Indian affairs has  
2 expressly provided that State laws shall apply.” *Washington v. Confed. Bands and*  
3 *Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979).

4 In 1953, concerned with “the absence of adequate tribal institutions for law  
5 enforcement” on “certain Indian reservations,” Congress enacted Public Law 280,  
6 which required some states and authorized others to assume criminal and civil  
7 jurisdiction in Indian Country within a state’s borders. *See Bryan v. Itasca Cty.,*  
8 *Minn.*, 426 U.S. 373, 379 (1976)); Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). In  
9 1957, Washington enacted a law establishing state jurisdiction over any Indian  
10 reservation for any tribe that requested the State’s assumption of jurisdiction.  
11 *Confed. Bands*, 439 U.S. at 474.

12 In 1963, Washington passed legislation allowing the State to assume civil  
13 and criminal jurisdiction pursuant to Public Law 280 over “Indians and Indian  
14 territory, reservations, country, and lands within this state,” with certain limited  
15 exceptions. *See* RCW 37.12.010. Specifically, Washington did not assume  
16 jurisdiction over lands held in trust by the United States or held by a tribe in  
17 restricted fee status, unless the tribe consented, except in the following eight areas:  
18 (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4)  
19 mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent  
20 children; and (8) operations of motor vehicles on public roads. *See* RCW

1 37.12.010. The Yakama Nation did not agree to the law and unsuccessfully  
2 challenged it in the United States Supreme Court. *Washington v. Confed. Bands &*  
3 *Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

4 In 1968, Congress amended Public Law 280 and repealed the option for  
5 states to assume jurisdiction over Indian Country without tribal consent, making  
6 tribal consent a prerequisite for any state assuming jurisdiction over Indian  
7 Country. 25 U.S.C. § 1322(a). For Washington and other states that had already  
8 assumed jurisdiction, Congress authorized the United States to “accept a  
9 retrocession by any State of all or any measure of the criminal or civil jurisdiction,  
10 or both, acquired by such State pursuant to the provisions of [Public Law 280] as it  
11 was in effect prior to [the 1968 amendments].” 25 U.S.C. § 1323(a). The  
12 President delegated the authority to accept retrocessions to the Secretary of the  
13 Interior, in consultation with the Attorney General. *See* Exec. Order No. 11435  
14 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968).

15 In 2012, the Washington State Legislature adopted a law codifying the  
16 process by which the State could retrocede its Public Law 280 jurisdiction to the  
17 United States. *See* RCW 37.12.160. The Yakama Nation filed a petition with the  
18 Office of the Governor on July 17, 2012, asking the State to retrocede its civil and  
19 criminal jurisdiction over “all Yakama Nation Indian Country” and in five areas  
20 listed in RCW 37.12.010.

1 On January 17, 2014, Washington State Governor Jay Inslee issued  
2 Proclamation by the Governor 14-01 (“Proclamation 14-01”) partially retroceding  
3 the State of Washington’s jurisdiction over the Yakama Reservation back to the  
4 United States. Ex. 102. Three provisions of that Proclamation are relevant to the  
5 dispute now before the Court. First, the State of Washington retroceded to the  
6 United States “full civil and criminal jurisdiction” in four areas of law:  
7 Compulsory School Attendance; Public Assistance; Domestic Relations; and  
8 Juvenile Delinquency. *Id.* at 2, ¶ 1. Second, the State of Washington retroceded  
9 “in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public  
10 Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to  
11 RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action  
12 involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the  
13 State shall retain jurisdiction over criminal offenses involving non-Indian  
14 defendants and non-Indian victims.” *Id.* at 2, ¶ 2. Third, the State of Washington  
15 specified that the State would “retrocede, in part, criminal jurisdiction over certain  
16 criminal offenses,” and “retain[] jurisdiction over criminal offenses involving *non-*  
17 *Indian defendants and non-Indian victims.*” *Id.* at 2, ¶ 3 (emphasis added). In a  
18 letter transmitting the proclamation to the Department of the Interior (“DOI”) on  
19 January 27, 2014, Governor Inslee explained that the State’s retrocession of  
20

1 criminal jurisdiction was intended to retain jurisdiction whenever “non-Indian  
2 defendants *and/or* non-Indian victims” were involved. Ex. 103.

3 On October 19, 2015, DOI notified the Yakama Nation of the United States’  
4 acceptance of “partial civil and criminal jurisdiction over the Yakama Nation.”  
5 Ex. 104. Regarding the “extent of retrocession,” DOI stated that Governor Inslee’s  
6 proclamation was “plain on its face and unambiguous.” *Id.* at 4. Noting its  
7 concern that “unnecessary interpretation might simply cause confusion,” DOI  
8 explained that “[i]f a disagreement develops as to the scope of the retrocession, we  
9 are confident that courts will provide a definitive interpretation of this plain  
10 language of the Proclamation.” *Id.* Pursuant to the DOI’s instructions, the United  
11 States formally implemented retrocession on April 19, 2016, following significant  
12 coordination between the Yakama Nation, the United States, the State of  
13 Washington, and local jurisdictions. *See* Ex. 106.

14 Plaintiff asserts that, following the United States’ acceptance of partial  
15 retrocession of jurisdiction within the Yakama Reservation, “Klickitat County may  
16 no longer exercise any criminal jurisdiction over a minor Yakama Member for  
17 alleged crimes committed on the Yakama Reservation; that jurisdiction lies with  
18 the Yakama Nation and/or the United States.” ECF No. 1 at 7, ¶ 5.14. Plaintiff  
19 goes further and maintains that “Klickitat County does not have the authority or  
20 jurisdiction to arrest, detain, charge, prosecute, convict, or sentence Yakama

1 Members for alleged crimes occurring within Indian Country as defined by 18  
2 U.S.C. 1151, including by definition all land within the exterior boundaries of the  
3 Yakama Reservation.”

4 On September 27, 2017, Klickitat County arrested PTS, an enrolled Yakama  
5 member and minor, detained PTS at the Northern Oregon Regional Correctional  
6 Facility, and charged PTS with two counts of statutory rape. *Id.* at ¶ 5.16. Plaintiff  
7 asserts that the alleged crimes occurred within the exterior boundaries of the  
8 Yakama Reservation near Glenwood, within Tract D. *Id.* at ¶ 5.17. Plaintiff  
9 argues that Defendants have acted unlawfully by arresting, detaining, charging,  
10 prosecuting, and convicting PTS. *Id.* at ¶ 5.18; *see* Ex. 574.

11 More recently, on October 13, 2018, Plaintiff complains of an arrest of  
12 Yakama member Robert Libby within the city of Glenwood, in Tract D. Mr.  
13 Libby was arrested and charged with various firearms related crimes and traffic  
14 offenses by Klickitat County. *See* ECF No. 36 at 24-25.

15 Defendants confirm that they exercised criminal jurisdiction over Yakama  
16 members within Tract D and do not deny their intent to continue exercising  
17 criminal jurisdiction within Tract D because they contend it is not within the  
18 Yakama Reservation.

19 The Court viewed the plain language of Governor Inslee’s retrocession  
20 proclamation, DOI’s acceptance of retrocession, and federal and state law

1 governing the retrocession process as properly establishing the limitations of the  
2 States' retrocession. The State of Washington retroceded to the United States "full  
3 civil and criminal jurisdiction" in four areas of law: Compulsory School  
4 Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.

5 Accordingly, since Tract D is within the Yakama Reservation, acts of  
6 Juvenile Delinquency committed by Indians, like PTS, are governed by federal and  
7 tribal law, not state law. The Court does not vacate PTS's conviction however as  
8 this Court does not have jurisdiction, in this proceeding, to grant that form of relief.  
9 Furthermore, the Court understands that PTS did not claim or prove his Indian  
10 status as a jurisdictional defense to those charges.

11 The State of Washington retroceded "in part, civil and criminal jurisdiction  
12 in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways  
13 cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall  
14 retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-  
15 Indian defendants, and non-Indian victims; the State shall retain jurisdiction over  
16 criminal offenses involving non-Indian defendants and non-Indian victims." Ex.  
17 102 at 2, ¶ 2. Traffic offenses committed by Indians, like Robert Libby, are  
18 governed by federal and tribal law, not state law. The Court does not vacate  
19 Robert Libby's convictions, if any, as this Court does not have jurisdiction, in this  
20 proceeding, to grant that form of relief. Furthermore, the Court understands that

1 Robert Libby has not claimed or proven his Indian status as a jurisdictional defense  
2 to those charges.

3 Finally, the Court concludes that Plaintiff's interpretation of the extent of  
4 retrocession for other crimes is too expansive. Reading the plain language of the  
5 Governor's use of the sentence "The State retains jurisdiction over criminal  
6 offenses involving non-Indian defendants and non-Indian victims" in context, both  
7 historical and in the context of the entire retrocession proclamation, makes clear  
8 that the State retained jurisdiction in two areas—over criminal offenses involving  
9 non-Indian defendants and over criminal offenses involving non-Indian victims.  
10 Accordingly, the State and necessarily the Defendants here have criminal  
11 jurisdiction over offenses committed by or against non-Indians within the Yakama  
12 Reservation.

13 Consistent with this Court's prior ruling in *Confed. Tribes v. City of*  
14 *Toppenish*, 1:18-CV-03190-TOR, ECF No. 28 (Feb. 22, 2019), the Court rejects  
15 Plaintiff's argument that Defendants no longer have criminal jurisdiction over  
16 Indians within the Yakama Reservation following retrocession. In order to explain  
17 the Court's reasoning and for completeness, it is necessary to repeat the court's  
18 analysis of the various arguments made there and here. *See* ECF No. 36, Yakama  
19 Nation's Motion for Preliminary Injunction.



1 Plaintiff contends that the State retroceded criminal jurisdiction “over all  
2 crimes within the Yakama Reservation where an Indian is involved *as a defendant*  
3 *and/or victim.*” (emphasis added). Accordingly, Plaintiff insists that Defendants  
4 are violating the Yakama Nation’s treaty rights and threatening its sovereignty by  
5 exercising criminal jurisdiction over enrolled Yakama members within the Yakama  
6 Reservation. Defendants maintain that, while the State retroceded some criminal  
7 jurisdiction to the United States, the State retained jurisdiction over criminal  
8 offenses involving non-Indian defendants *and/or* non-Indian victims within the  
9 Yakama Reservation.

10 Plaintiff provides four reasons why the United States reassumed “the full  
11 scope of Public Law 280 criminal jurisdiction” from the State of Washington: (1)  
12 in accepting retrocession, DOI interpreted the Governor’s proclamation as  
13 retroceding all criminal jurisdiction over offenses whenever a Yakama member is  
14 involved as either a defendant and/or victim; (2) DOI’s acceptance of retrocession  
15 should be afforded judicial deference; (3) the United States Office of Legal  
16 Counsel’s recent memorandum opinion should be afforded no deference; and (4)  
17 Washington’s attempt to claw back jurisdiction it clearly retroceded is not  
18 supported by applicable law.

19 In the Court’s view, Plaintiff’s arguments hinge entirely on the underlying  
20 assumption that DOI, in accepting retrocession, definitively identified the scope of

1 the State’s retrocession as (1) retroceding federal jurisdiction over all offenses  
2 occurring within the Yakama Reservation whenever an Indian is involved as a  
3 defendant and/or victim and (2) retaining criminal jurisdiction only over criminal  
4 offenses involving both a non-Indian defendant and non-Indian victim, as well as  
5 non-Indian victimless crimes. Assuming this is DOI’s interpretation, Plaintiff  
6 urges a “federal-focus perspective on interpreting retrocessions,” arguing that “the  
7 Department of the Interior’s actions are controlling, regardless of any other  
8 governments’ and agencies’ contrary interpretation.” And, according to Plaintiff,  
9 applying the federal-focus perspective to DOI’s actions in this case unambiguously  
10 support Plaintiff’s interpretation of the scope of retrocession—i.e., retroceding  
11 criminal jurisdiction over all offenses where a Yakama member is involved.

12 Unlike the Plaintiff, the Court is not convinced that DOI, in accepting  
13 retrocession, necessarily understood the Governor’s retrocession proclamation as  
14 an offer to retrocede criminal jurisdiction over all crimes within the Yakama  
15 Reservation whenever an Indian is involved “as a defendant and/or victim.” The  
16 retrocession proclamation, paragraph 3 provides in relevant part:

17 Within the exterior boundaries of the Yakama Reservation, the State  
18 shall retrocede, in part, criminal jurisdiction over certain criminal  
19 offenses not addressed by Paragraphs 1 and 2. The State retains  
20 jurisdiction over criminal offenses involving *non-Indian defendants*  
*and non-Indian victims.*

1 Ex. 102 (emphasis added). Thus, the State expressly retained jurisdiction over “all  
2 criminal offenses involving *non-Indian defendants and non-Indian victims*.” As  
3 noted, in the letter transmitting the proclamation to DOI on January 27, 2014,  
4 Governor Inslee clarified that the State’s intent in retroceding criminal jurisdiction  
5 was to retain jurisdiction whenever “non-Indian defendants *and/or* non-Indian  
6 victims” were involved. Ex. 103.

7 In DOI’s October 19, 2015, letter notifying the Yakama Nation of  
8 retrocession, DOI confirmed that it had accepted the Governor’s offer of  
9 retrocession and briefly addressed the “extent of retrocession” issue. Ex. 104 at 5.  
10 After confirming that “Washington law clearly sets forth the process for  
11 retrocession of civil or criminal jurisdiction in Washington State,” DOI summarily  
12 concluded that the Governor’s proclamation was “plain on its face and  
13 unambiguous.” *Id.* However, DOI then continued:

14 We worry that unnecessary interpretation might simply cause  
15 confusion. If a disagreement develops as to the scope of the  
16 retrocession, we are confident that courts will provide a definitive  
17 interpretation of the plain language of the Proclamation. In sum, it is  
18 the content of the Proclamation that we hereby accept in approving  
19 retrocession.

20 *Id.*

Plaintiff maintains that DOI’s interpretation of the proclamation as “plain on  
its face and unambiguous,” and its characterization of any subsequent

1 interpretation as “unnecessary,” amounts to an express rejection of Governor  
2 Inslee’s subsequent clarification that the proclamation’s intent was to retain state  
3 criminal jurisdiction over cases involving “non-Indian defendants *and/or* non-  
4 Indian victims.” The Court, however, disagrees. Rather than weighing in on the  
5 issue, DOI expressly declined to delineate the scope of retrocession, instead  
6 leaving it for the courts to “provide a definitive interpretation of the plain language  
7 of the Proclamation.” *Id.*

8 Informative and not necessarily binding on this Court, a Washington court  
9 has now provided a definitive interpretation of the plain language of the  
10 Governor’s retrocession proclamation and, in doing so, has clarified the scope of  
11 Washington’s criminal jurisdiction within exterior boundaries of the Yakama  
12 Reservation following retrocession. *See State v. Zack*, 2 Wash. App. 2d 667,  
13 *review denied*, 191 Wash. 2d 1011 (2018). In *State v. Zack*, Division Three of the  
14 Washington Court of Appeals considered a jurisdictional challenge to the scope of  
15 the State’s post-retrocession criminal jurisdiction within the Yakama Reservation,  
16 almost identical to Plaintiff’s challenge here. The *Zack* court determined that  
17 “[t]he jurisdiction issue turns on the meaning of the Governor’s proclamation, with  
18 the dispositive question being the meaning of the word ‘and.’” *Id.* at 672. The  
19 *Zack* court is the only court, state or federal, to consider whether the Governor’s

1 use of the word “and” in the contested retrocession provision should be read in the  
2 conjunctive or disjunctive.

3 Performing a plain language analysis, the *Zack* court concluded that the  
4 word “and” should be read in the disjunctive—i.e., “non-Indian defendant *and/or*  
5 non-Indian victim”—because the conjunctive interpretation “would render the  
6 proclamation internally inconsistent and nonsensical.” *Id.* As the court explained,  
7 appellant’s proposed construction, and the one advanced by Plaintiff in this case,  
8 “would mean that the only type of case the State could prosecute would require the  
9 involvement of non-Indian defendants who victimized other non-Indians on fee  
10 land.” *Id.* at 675. However, because “[t]he State already had authority to  
11 prosecute non-Indians for offenses committed on deeded lands prior to the  
12 enactment of Public Law 280,” and the Governor was only authorized to retrocede  
13 jurisdiction acquired under Public Law 280, the *Zack* court concluded that the  
14 conjunctive construction “would result in the Governor engaging in *ultra vires*  
15 action.” *Id.* at 675-76 (“Asserting or removing state jurisdiction over non-Indians  
16 is not within the scope of Public Law 280 or RCW 37.12.010.”). The *Zack* court  
17 further observed that excluding Indians from prosecution in all cases “would mean  
18 that the Governor intended to return all of the criminal jurisdiction the State  
19 assumed by RCW 37.12.010 and the word ‘in part’ would be rendered meaningless  
20 because there would have been total rather than partial retrocession.” *Id.* at 675.

1 For these reasons, the court held that “the State retained jurisdiction to prosecute  
2 this assault against a non-Indian occurring on deeded land within the boundaries of  
3 the Yakama reservation.” *Id.* at 676.

4       Though the Court is not bound by the decision, the Court finds the *Zack*  
5 court’s analysis and holding persuasive, particularly when considering the  
6 historical patchwork of federal, state, and tribal criminal jurisdiction on the  
7 Yakama Reservation. Before the enactment of Public Law 280 or RCW  
8 37.12.010, “the Yakima Nation was subject to the general jurisdictional principles  
9 that apply in Indian country in the absence of federal legislation to the contrary.”  
10 *Confed. Bands*, 439 U.S. at 470. Under those principles, while Indian tribes  
11 generally retain criminal jurisdiction over Indians within Indian reservations, tribes  
12 have no “inherent jurisdiction to try and to punish non-Indians.” *Id.*; *Oliphant v.*  
13 *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Thus, only the state possessed  
14 criminal jurisdiction over non-Indians who committed crimes against other non-  
15 Indians on Indian reservations. *See, e.g., Draper v. United States*, 164 U.S. 240,  
16 242-43 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882). Victimless  
17 crimes committed by non-Indians in Indian country are also within the exclusive  
18 jurisdiction of the state. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).  
19 Neither the federal government nor the Tribe have jurisdiction over these crimes.

1 Public Law 280 authorized the State of Washington to assume full or partial  
2 jurisdiction over criminal offenses and civil causes of action involving Indians in  
3 Indian Country within the State's borders. *Confed. Bands*, 439 U.S. at 471-72. In  
4 1963, the State opted to assume some jurisdiction under Public Law 280. *See*  
5 RCW 37.12.010. As the Supreme Court explained, "[f]ull criminal and civil  
6 jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in  
7 every Indian reservation and to trust and allotted lands therein when non-Indians  
8 were involved." *Confed. Bands*, 439 U.S. at 475. However, "state jurisdiction was  
9 not extended to Indians on allotted and trust lands unless the affected tribe so  
10 requested," except for those eight areas of law specified in RCW 37.12.010(1)-(8).  
11 *Id.*

12 When Congress amended Public Law 280 in 1968, it authorized the United  
13 States to "accept a retrocession by any State of all or any measure of the criminal  
14 or civil jurisdiction" previously acquired pursuant to Public Law 280. 25 U.S.C. §  
15 1323(a). By Executive Order, the Secretary of the Interior was then empowered to  
16 accept "*all or any measure*" of a state's offer of retrocession. *See* Exec. Order No.  
17 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968) (emphasis added).  
18 However, neither § 1323 nor the Executive Order authorize the Secretary to accept  
19 *more* jurisdiction than a state initially acquired under Public Law 280. Under  
20

1 federal law, a state may only retrocede any measure of jurisdiction “acquired by  
2 such State pursuant to [Public Law 280].” 25 U.S.C. § 1323(a).

3 The State of Washington’s statute outlining the retrocession process, RCW  
4 37.12.160(1), confirms that the State may only “retrocede to the United States all  
5 or part of the civil and/or criminal jurisdiction previously acquired by the state over  
6 a federally recognized Indian tribe, and the Indian country of such tribe.”

7 Particularly relevant here, the statute specifically defines “criminal retrocession” as  
8 “the state’s act of returning to the federal government the criminal jurisdiction  
9 acquired over Indians and Indian country under federal Public Law 280.” RCW  
10 37.12.160(9)(b).

11 Plaintiff urges the Court to interpret the Governor’s retrocession  
12 proclamation, and DOI’s acceptance of retrocession, as retroceding all criminal  
13 jurisdiction over crimes committed within the Yakama Reservation, including land  
14 held in fee by Indian and non-Indian owners, whenever an Indian is involved as a  
15 defendant and/or victim. Stated differently, Plaintiff maintains that “[t]he only  
16 criminal offenses over which the State retained jurisdiction are those involving  
17 both a non-Indian defendant and non-Indian victim, as well as non-Indian  
18 victimless crimes.” Plaintiff claims that DOI’s acceptance of retrocession “does  
19 not leave open the possibility of the State continuing to play a role in Indian-  
20 involved crimes within the Yakama Reservation.”



1           However, interpreting the Governor’s retrocession proclamation as Plaintiff  
2 insists “would result in the Governor engaging in an *ultra vires* action,” as the offer  
3 of retrocession would be *returning* more jurisdiction to the United States than the  
4 State assumed under Public Law 280 and RCW 37.12.010. *Zack*, 2 Wash. App. 2d  
5 at 676. As noted, the State’s authority to prosecute non-Indians for crimes  
6 committed against non-Indians on the Yakama Reservation preexists Public Law  
7 280 or RCW 37.12.010. Under Plaintiff’s interpretation, the State would be  
8 “retaining” jurisdiction that it simply did not acquire from the United States  
9 pursuant to Public Law 280. The Court accepts the *Zack* court’s logical  
10 interpretation, which is consistent with Public Law 280 and RCW 37.12.160’s  
11 instructions.

12           Reading the Governor’s use of the sentence “The State retains jurisdiction  
13 over criminal offenses involving non-Indian defendants and non-Indian victims.”  
14 in context, both historical and in the context of the entire retrocession  
15 proclamation, also makes it plain that the State was retaining jurisdiction in two  
16 areas—over criminal offenses involving non-Indian defendants and over criminal  
17 offenses involving non-Indian victims. The plain reading of the language thus also  
18 shows the limitation of the States’ retrocession.

19           Moreover, Plaintiff’s interpretation directly contradicts Governor Inslee’s  
20 stated intent to “retrocede, *in part*, criminal jurisdiction.” (emphasis added).

1 Under Plaintiff’s view of the scope of retrocession, the State retroceded all  
2 criminal jurisdiction assumed under Public Law 280, retaining only that  
3 jurisdiction that predated Public Law 280—*i.e.*, the “authority to punish offenses  
4 committed by her own citizens upon Indian reservations.” *Draper v. United States*,  
5 164 U.S. 250, 247 (1896). This interpretation is at odds with Governor Inslee’s  
6 stated intent of retroceding some, but not all, criminal jurisdiction acquired under  
7 Public Law 280. The Court cannot reconcile Plaintiff’s illogical interpretation of  
8 the scope of retrocession with the plain language of the Governor’s retrocession  
9 proclamation, or federal and state law.

10 The Court concludes that the State retained jurisdiction over criminal  
11 offenses where the perpetrator or the victim is a non-Indian. This interpretation is  
12 consistent with the plain language of the Governor’s retrocession proclamation,  
13 DOI’s acceptance, and federal and state law governing the retrocession process.  
14 Accordingly, the Court finds that Defendants have criminal jurisdiction over  
15 offenses committed by or against non-Indians within the Yakama Reservation.

#### 16 **INJUNCTION AND/OR DECLARATORY JUDGMENT**

17 To obtain a permanent or final injunction, a “plaintiff must demonstrate: (1)  
18 that it has suffered an irreparable injury; (2) that remedies available at law, such as  
19 monetary damages, are inadequate to compensate for that injury; (3) that,  
20 considering the balance of hardships between the plaintiff and defendant, a remedy

1 in equity is warranted; and (4) that the public interest would not be disserved by a  
2 permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391  
3 (2006); *see also Indep. Training & Apprenticeship Program v. California Dep’t of*  
4 *Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Plaintiff must satisfy each  
5 element for injunctive relief. The decision to grant or deny permanent injunctive  
6 relief is an act of equitable discretion by the district court, reviewable on appeal for  
7 abuse of discretion. *eBay Inc.*, 547 U.S. at 391.

8 In 1934, Congress empowered the federal courts to grant a new remedy, the  
9 declaratory judgment. The purpose of the Federal Declaratory Judgment Act was  
10 to provide a milder alternative to the injunction remedy. *Steffel v. Thompson*, 415  
11 U.S. 452, 467 (1974) (quoting *Peres v. Ledesma*, 401 U.S. 82, 111 (1971) (separate  
12 opinion of Brennan, J.)). “[A] federal district court has the duty to decide the  
13 appropriateness and the merits of the declaratory request irrespective of its  
14 conclusion as to the propriety of the issuance of the injunction.” *Id.* at 468  
15 (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). Different considerations  
16 enter into a federal court’s decision as to declaratory relief, on the one hand, and  
17 injunctive relief, on the other. *Steffel*, 415 U.S. at 469 (citations omitted). A  
18 declaratory judgment will have a “less intrusive effect on the administration of  
19 state criminal laws,” “it is a much milder form of relief than an injunction,” and  
20 noncompliance is not punishable by contempt. *See id.* at 469-71. A failure to

1 demonstrate irreparable injury does not preclude the granting of declaratory relief.  
2 *See id.* at 471-72. Thus, the Supreme Court held that, “regardless of whether  
3 injunctive relief may be appropriate, federal declaratory relief is not precluded  
4 when no state prosecution is pending and a federal plaintiff demonstrates a genuine  
5 threat of enforcement of a disputed state criminal statute . . .” *Id.* at 475.

6 In consideration of the fact that the two state prosecutions which help to  
7 predicate this Court’s jurisdiction are final, and in consideration of the equities, the  
8 Court concludes that an injunction at this time is unnecessary, but rather a  
9 declaratory judgment will achieve the purposes of declaring the southwestern  
10 boundary of the Reservation and scope of applicable state laws.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 12 1. A Declaratory Judgment shall be entered declaring that: Tract D, as  
13 surveyed by Cadastral Engineer Ronald Scherler and approved by the  
14 United States in 1982, is located within the exterior boundaries of the  
15 Yakama Reservation established by the Treaty of 1855. The boundaries  
16 of the area of land referred to as Tract D are those surveyed by E.D.  
17 Calvin in 1932, and by Ronald Scherler in 1982, within which there are  
18 approximately 121,465.69 acres. Not all of Tract D falls within Klickitat  
19 County.

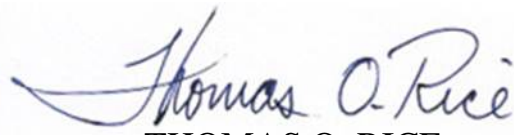
- 1           2. A Declaratory Judgment shall be entered declaring that since Tract D is  
2           within the Yakama Reservation and the State of Washington retroceded  
3           all jurisdiction concerning acts of Juvenile Delinquency committed  
4           therein by Indians, state juvenile delinquency law no longer applies to  
5           Indians within the Reservation, including Tract D.
- 6           3. A Declaratory Judgment shall be entered declaring that since Tract D is  
7           within the Yakama Reservation and the State of Washington retroceded  
8           “in part, civil and criminal jurisdiction in Operation of Motor Vehicles on  
9           Public Streets, Alleys, Roads, and Highways cases in the following  
10          manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction  
11          over civil causes of action involving non-Indian plaintiffs, non-Indian  
12          defendants, and non-Indian victims; the State shall retain jurisdiction  
13          over criminal offenses involving non-Indian defendants and non-Indian  
14          victims.” Thus, traffic offenses committed by Indians are governed by  
15          federal and tribal law, not state law.
- 16          4. A Declaratory Judgment shall be entered declaring that since Tract D is  
17          within the Yakama Reservation and the State of Washington retroceded  
18          certain jurisdiction but retained jurisdiction in two areas—over criminal  
19          offenses involving non-Indian defendants and over criminal offenses  
20          involving non-Indian victims—accordingly, the State and necessarily the

1 Defendants here have criminal jurisdiction over offenses committed by or  
2 against non-Indians within the Yakama Reservation, including Tract D.

3 The District Court Executive is directed to enter this Order, enter Judgment  
4 accordingly, furnish copies to counsel, and close this case.

5 DATED August 28, 2019.



  
THOMAS O. RICE  
Chief United States District Judge